In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1742

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondent.

AMICUS CURIAE BRIEF OF STATE OF MISSOURI

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INTEREST OF AMICUS CURIAE

This case presents the question whether under the Clean Air Act, 42 U.S.C. §1857, *et seq.*, variances from particular requirements of the state implementation plans are allowed, or whether Section 110(f) of the Act, 42 U.S.C. §1857c-5(f), is the only vehicle for deferring the application of a standard, limitation, time schedule or other requirement of a state implementation plan.[1] The State of

1. 42 U.S.C. §1857c-5(f) authorizes the Governor to apply for, and EPA to approve, a postponement of any requirement of an applicable implementation plan for a period of one year upon certain conditions. This postponement can be requested only up to the date on which a source or class of sources is required to meet the applicable requirement.

Section 110(e) of the Act, 42 U.S.C. §1857c-5(e), provides for an extension of the date for attaining a national primary ambient air quality standard for a period of up to two years beyond the three-year date specified by 42 U.S.C. §1857c-5(a)(2)(A)(i). However, 42 U.S.C. §1857c-5(e) is not at issue in this case, as an application for such extension can be made only at the time a state implementation plan is submitted. The deadline for submission of such plans was May 31, 1972.

Missouri, through the Missouri Air Conservation Commission, is responsible for formulating and enforcing its implementation plan. The state's Air Pollution Control Law, Sections 203.010 to 203.195, RSMo 1969, as amended, contains a variance procedure similar to that of the State of Georgia, and almost identical to that of *amicus curiae*, State of Texas.[2]

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2. §203.110:

"1. The commission may grant individual variances beyond the limitations prescribed in this chapter whenever it is found, upon presentation of adequate proof, that compliance with any provision of this chapter or any rule or regulation, standard, requirement, or order of the commission or executive secretary will result in an arbitrary and unreasonable taking of property or in the practical closing and elimination of any lawful business, occupation or activity, in either case without sufficient corresponding benefit or advantage to the people; except, that no variance shall be granted where the effect of the variance will permit the continuance of a health hazard; and except, also, that any variance so granted shall not be so construed as to relieve the person who receives the variance from any liability imposed by other law for the commission or maintenance of a nuisance.

2. In determining under what conditions and to what extent a variance may be granted, the commission shall exercise a wide discretion in weighing the equities involved and the advantages and disadvantages to the applicant and to those affected by air contaminants emitted by the applicant.

3. Variances shall be granted for such period of time and under such terms and conditions as shall be specified by the commission in its order. The variance may be extended by affirmative action of the commission.

4. Any person seeking a variance shall do so by filing a petition for variance with the executive secretary. The executive secretary shall promptly investigate the petition and make a recommendation to the commission as to the disposition thereof. Upon receiving the recommendation of the executive secretary, if the recommendation is against the granting of a variance, a hearing shall be held if requested as provided in section 203.100. If the recommendation of the executive secretary is for the granting of a variance, the commission may do so without a hearing; except, that upon the petition of any person aggrieved by the granting of the variance, a hearing shall be held as provided in section 203.100. In any hearing under this section, however, the burden of proof shall be on the person petitioning for a variance.

5. Upon failure to comply with the terms and conditions of any variance as specified by the commission, the variance may

(Continued on following page)

In addition to the general concern of the State of Missouri that variance procedures be upheld under the Clean Air Act, and that those persons who hold variances from the Missouri Air Conservation Commission not be faced with enforcement action because they have in good faith relied on the variances granted them, Missouri has another interest in the instant case. There is presently pending in the United States Court of Appeals for the Eighth Circuit a petition by the Union Electric Company, the major supplier of electric power for the St. Louis area, for review of the sulfur dioxide regulations of the Missouri implementation plan.[3] The State of Missouri has intervened in the Union Electric case, and has presented the Court of Appeals with the suggestion that since the Missouri Air Conservation Commission has not passed on Union Electric's applications for variances from the sulfur dioxide regulations, the petition should be dismissed, or held in abeyance, until the state has the opportunity to do so.[4] If this Court were to affirm the decision of the Court of Appeals below, Missouri would of course be foreclosed from making this contention.

Footnote Continued—

be revoked or modified by the commission after a hearing held upon not less than thirty days' written notice. The notice shall be served upon all persons who will be subjected to greater restrictions if the variance is revoked or modified, or who have filed with the executive secretary a written request for notification."

3. *Union Electric Co.* v. *Environmental Protection Agency*, No. 74-1614, 8th Cir., petition filed August 19, 1974. Oral argument on the question of jurisdiction will be heard on January 10, 1975.

4. This position is based on language in *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), which indicates that the Courts of Appeals may not review a state regulation if the state has not yet passed on a variance request.

ARGUMENT

Congress Did Not Intend to Foreclose the States from Granting Variances from Their Respective Implementation Plans Where Such Variances Would Not Interfere with the Attainment and Maintenance of National Ambient Air Quality Standards.

The basic question before this Court is whether the Clean Air Act leaves room for the states to grant certain types of variances from their respective implementation plans. Counsel for the State of Missouri trusts that the parties to this case will present the relevant case law and statutory citations, and, therefore, Missouri has no need to present a lengthy brief on the subject. However, Missouri is concerned that the opinion of the Court of Appeals for the Ninth Circuit be presented to the Court as the correct construction of the Clean Air Act.

That opinion, *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, No. 72-2145 (9th Cir., Nov. 11, 1974), held that minor variances (those variances which will not interfere with the attainment and maintenance of national ambient air quality standards) could be granted even beyond the date specified by 42 U.S.C. §1857c-5(a)(2)(A)(i). This opinion goes beyond the positions taken by the First, Second and Eighth Circuits,[5] and beyond the postition now taken by EPA.[6] Missouri sub-

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5. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 478 F.2d 875 (1st Cir. 1973); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 483 F.2d 690 (8th Cir. 1973); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 494 F.2d 519 (2d Cir. 1974).

6. 40 C.F.R. §§51.11(g), 51.15(d), 51.32(f). Prior to the 1st Cir. Opinion, EPA had taken the position that variances which did not interfere with the attainment and maintenance of national standards would be permitted as revisions of the implementation plan during both the pre-attainment and post-attainment periods. 40 C.F.R. §§51.6, 51.32(f).

mits that the proper construction of the Clean Air Act would allow minor variances (those variances not interfering with attainment and maintenance of national standards) both before and after the mandatory attainment date, and that the decision whether to grant such variances is left by the Act to the respective states.

It is the position of the State of Missouri that 42 U.S.C. §1857c-5(f) was not intended by Congress to be the exclusive means of granting relief from a particular requirement of an implementation plan, where a source of emissions cannot comply with the plan because of technological infeasibility. This position is based on the proposition that the attainment and maintenance of national ambient air quality standards, and not emission limitation, is the basic goal of the Act, and that under the Clean Air Act, as amended, the primary responsibility for attainment and maintenance of the national standards still resides in the states. These propositions are adequately supported by a reading of the Clean Air Act as a whole, rather than narrowing the inquiry to an analysis of the specific language of 42 U.S.C. §1857c-5(f) alone. The United States has thoroughly covered these points in its brief, and Missouri will not burden the Court with a repetition of these arguments. Instead, Missouri will argue that the rationale of the Ninth Circuit should be adopted by this Court.

As discussed above, the Ninth Circuit has held that the Clean Air Act does not prohibit the states from granting variances from particular requirements of implementation plans, where such variances will not interfere with the attainment and maintenance of ambient air quality standards. The State of Missouri believes that the Ninth Circuit position is the only logical one to take when the practical effects of the other positions are considered.

The effects of the other positions before the Court can readily be seen from the following situation. A large electric utility, supplying 99 percent of the electric power to a metropolitan area of 1.8 million people, is in violation of specific emission limitations (set by state regulations) at the mandatory attainment date. However, the national ambient air quality standards for that pollutant are not being exceeded for the metropolitan area. The utility finds that it is unable to apply those emission control techniques required to bring its emissions of the particular pollutant within state regulation limitations, because the technology for such controls has not been developed, or because shortages of fuels and/or control equipment make compliance with the state emission limitation impossible at the present time.[7]

Faced with this situation, the utility has a choice. Under the positions taken by the United States and Natural Resources Defense Council, Inc., it can either continue to operate in violation of the emission limitation and face large fines for such violations, or it can shut down its operations, thereby causing a substantial, even massive disruption of the regional economy and a threat to the public welfare. We submit that Congress did not intend such a result and that the Clean Air Act cannot be read to mandate such a result.

Accepting the proposition that the regulatory scheme of the Act is designed to force the development of new air

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7. Although at the moment hypothetical, we believe that this set of facts could exist in Missouri on June 1, 1975, with respect to sulfur dioxide emission limitations. The hypothetical assumes that the one-year postponement provided in 42 U.S.C. §1857c-5(f) was not taken advantage of. The same situation could well exist on June 1, 1976, after the one-year postponement had expired, even if the postponement were applied for and granted.

pollution control technology, Congress could not have intended that substantial economic disruption should occur, where the national ambient air quality standards are being met and maintained, simply to achieve an emission limitation which was ambitiously set at a level more stringent than necessary. The national ambient air quality standards, by definition, are set at a level which will protect the public health and welfare.[8] If the public health and welfare are being adequately protected in an air control region, then it is illogical to enforce a more stringent emission limitation against a source which cannot comply with it,[9] especially when economic disruption detrimental to the public welfare will result.

Under the construction of the Clean Air Act, advanced by the parties to the case at bar, there is almost no flexibility in the Act to meet the exigencies of a situation where technology has not advanced as rapidly as anticipated in 1970. With the mandatory attainment date fast approaching,[10] there are still technological hurdles to be crossed in order to effectively control certain pollutants such as the

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8. 42 U.S.C. §1857c-4(b).

9. To some extent we are also talking about a situation where compliance with an emission limitation more stringent than necessary to meet national standards is technologically feasible, but economically infeasible. In some situations the cost of compliance could reach a point where it would have an economic impact outweighing the benefit to the public from extra increments of emission reduction. In such cases, we submit that the states should have the authority and responsibility to strike the balance between costs and benefits.

10. The mandatory attainment date for national primary ambient air quality standards in most states is May 31, 1975. 40 C.F.R. Part 52. In addition, a number of states must also meet secondary standards by that date. 40 C.F.R. Part 52.

photochemical oxidants.[11] And clean fuels are in shorter supply than anticipated in 1970. There seems to be little chance that some of the technological and resource supply problems will be resolved by mid-1975, or even mid-1976. Yet the positions of the First, Second and Eighth Circuits are that no later than mid-1976 (for most states) all sources must comply with emission limitations, even if national standards have been met and are being maintained. The position of the Fifth Circuit is, of course, even more restrictive.

Missouri submits that with regard to the issue before the court, the only logical construction of the Clean Air Act is that placed on it by the Ninth Circuit. That is, that 42 U.S.C. §1857c-5(f) is not the exclusive means of achieving flexibility in enforcement of state implementation plans. Instead, a state may grant a minor variance (one which does not interfere with the attainment and maintenance of national standards) even after the mandatory attainment date. Any other construction of the Act will result in absurd consequences,[12] and Congress cannot be presumed to have intended such absurdities.

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11. In addition, there is a great dispute between the EPA and the electric power industry as to whether the technology for controlling sulfur dioxide emissions is presently available. Furthermore, assuming EPA's position is correct that the technology for controlling sulfur dioxide emissions is now presently available, common sense dictates that all power plants in the United States cannot be brought into compliance by mid-1976, simply because it is physically impossible to complete such a massive construction program by mid-1976. Therefore, no matter what it is called, variances will have to be granted from such mandatory dates.

12. Major industrial and utility facilities closing down or paying large fines, even though the public health and welfare is being protected (because national ambient air quality standards are being met) and compliance within an emission limitation is impossible or economically ruinous, is, we submit, absurd.

Admittedly, all sources must comply with the national ambient air quality standards on the mandatory attainment date (unless a one-year postponement is granted pursuant to 42 U.S.C. §1857c-5(f)). Yet there is no statutory language which would suggest that minor variances be treated any differently after the attainment date than before such date. In fact the Act, in implicitly encouraging the states to adopt implementation plans more stringent than necessary to achieve and maintain the national standards,[13] would seem to require post-attainment flexibility. And it has been postulated that 42 U.S.C. §1857c-5(f) itself requires a uniform approach to pre-attainment and post-attainment variances.[14] We see no basis in the Act for a different treatment of pre-attainment and post-attainment variances.

An alternative to the granting of minor variances in cases of technological or economic infeasibility is, of course, a relaxation (lowering) of emission limitations to the bare minimum.[15] The difficulty with this approach is that it lowers air pollution control for all sources to the lowest common denominator. This approach flies in the face of reason and the provisions of 42 U.S.C. §1857d-1.[16]

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13. 42 U.S.C. §1857d-1; Comment, *Variance Procedures Under The Clean Air Act: The Need For Flexibility*, 15 Wm. and M. L. Rev. 324, 336-337 (1973).

14. *Id.*; see also *Natural Resources Defense Council, Inc. v. Environmental Protection Agency, supra*, Slip Opinion pp. 7-8.

15. EPA has suggested (at least implicitly) this approach in certain informal publications.

16. Footnote 13, *supra*; 42 U.S.C. §1857d-1 provides:

"Except as otherwise provided in sections 1857f-6a, 1857f-6c(c)(4), and 1857f-11 of this title (preempting certain State regulation of moving sources) nothing in this chapter

(Continued on following page)

Does it not make more sense to set emission limitations at levels which make an effort to improve ambient air quality, and make judicious use of minor variances to accomodate cases where the stringent limitations cannot be met for a period of time, than to require all sources to meet only the minimum levels of emission reduction necessary to protect the public health and welfare?

We submit that 42 U.S.C. §1857d-1 provides, at the least, that the respective states have the option to enact such a scheme of regulation. Otherwise, Congress would have had no reason to specifically provide in that section for state regulation and enforcement of emission limitations in the terms there provided. Congress could not have intended to enact a regulatory scheme encouraging innovation and progressive regulation, yet prohibit any flexibility after the scheme takes final effect.

It might also be suggested that the flexibility required to meet technological and economic reality could be provided by a judicious delay of enforcement, or the use of schedules of compliance in enforcement orders, by EPA.[17]

Footnote Continued—

shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if emission standard or limitation is in effect under an applicable implementation plan or under section 1857c-6 or section 1857c-7 of title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section."

17. EPA has suggested the use of such a scheme in its publication "National Strategy For Control of Sulfur Oxides From Electric Power Plants", pp. 16-17, 23-24 (Washington, D.C., July 1974).

This would amount, in effect, to EPA's granting of variances to individual sources. We feel, however, that this scheme is less desirable than state variance procedures, because state variances are granted after public hearing. EPA, on the other hand, need not hold a hearing, or otherwise subject a proposed enforcement order to public scrutiny. In addition, state variances can be granted only for certain specified reasons,[18] while EPA's standards of granting compliance delays are known only to them. We submit that state variance procedures, with approval of the variance by EPA,[19] is a more equitable procedure, less susceptible to abuse, and is a procedure contemplated by Congress when it enacted the Clean Air Act.

CONCLUSION

Amicus Curiae, the State of Missouri, submits that 42 U.S.C. §1857c-5(f) is not the exclusive method whereby compliance with particular requirements of a state implementation plan may be deferred if national ambient air quality standards are being met and maintained. Rather, the Clean Air Act allows the states to grant minor variances, subject to EPA approval, both before and after the mandatory attainment dates provided in 42 U.S.C. §1857c-5(a)(2)(A). Any other reading of the Clean Air Act would plainly defeat the intent of Congress to encourage the states to set emission limitations and compliance dates more stringent than required to meet national ambient air

18. See Appendix p. 1.

19. Variances are presently treated as revisions of the state implementation plan, 40 C.F.R. §51.6.

quality standards, and would result in inequitable, absurd and economically disastrous consequences.

Respectfully submitted,

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